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No. 83-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR AMICUS CURIAE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do exceptional circumstances exist which justify a review of the district court's findings of fact; if so, were those findings clearly erroneous?

2. Are educational institutions engaged in commercial activity exempt from antitrust rules condemning as *per se* unlawful horizontal agreements fixing prices and limiting output?

3. Can unreasonable restraints upon economic activity, both at the horizontal and vertical levels, be justified under the antitrust laws on the basis of asserted benefits which were not shown to have any logical relationship to the restraints?

4. Did a scheme under which horizontal competitors at one marketing level agreed with horizontal competitors at another marketing level to exclude purchasers of a unique product for which no reasonable alternatives exist violate the antitrust laws?

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The Association of Independent Television Stations, Inc.[1] submits this brief *amicus curiae* in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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[1] The following abbreviations will be used throughout:

"INTV" is the Association of Independent Television Stations, Inc.

"NCAA" is the petitioner, National Collegiate Athletic Association;

"Oklahoma" is respondent The Board of Regents of the University of Oklahoma; "Georgia" is respondent the University of Georgia Athletic Association;

[Footnote continued]

INTEREST OF AMICUS CURIAE

INTV is a national association representing some 97 independent television broadcast stations, that is, stations not affiliated with any national network and therefore which are unable to participate in the NCAA television plan and do not receive NCAA football games from a network. Independent stations produce or are in the market to purchase programming and are direct competitors of broadcast and cable television outlets for ABC, CBS and Turner, exclusive participants in the NCAA Television Plan. The NCAA plan effectively prevents universities from being able to sell television rights to their football games to independent stations, and prevents independent stations from purchasing and broadcasting such games in competition with the networks.[2]

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the case consists almost entirely of NCAA's imaginings, which it failed to prove either in the district court, which heard the evidence, or in

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[1] [Continued]

"Pet." and "Petition" refer to the Petition for a Writ of Certiorari.

References to the district court and Tenth Circuit opinions shall be to the Petition's appendix and designated either "C.A." or "D.C."

"NCAA Television Plan," "NCAA Plan" and "Television Plan" refer to NCAA's set of rules governing permissible television coverage of NCAA college football games on the national television networks through the series of agreements between NCAA and three television networks ABC, CBS and Turner.

[2] As the NCAA acknowledges, "the Plan authorizes only limited 'exception' telecasts that might compete with the networks or other live games. Major colleges generally may telecast their games outside the contracts only if they are sold out or are more than 400 miles from the visiting teams' campuses, and the telecasts would not interfere with attendance at any other game that is not sold out." (Pet. 3) The district court found: " . . . many more games

the court of appeals, which reviewed the entire record. The proven facts, pertinent to this petition, are these:

This case involves the sale by colleges and universities to broadcasters of the right to telecast college football games (D.C. 74a). NCAA football is the product which INTV members wish to buy from schools such as Oklahoma and Georgia, but because of the NCAA television plan, cannot.

Oklahoma, Georgia and some 900 other colleges and universities are members of the NCAA, an association of independent, four year colleges and universities. These colleges and universities are, like legal and medical professionals, in a commercial as well as a professional undertaking.[3] They compete with each other "for students, for faculty, for government grants, and for philanthropic support. It is a big business and millions of dollars are involved. The same is true of college football. It is a business, and it must behave in a businesslike manner to insure its future viability" (D.C. 55a). The NCAA, while seeking special, non-commercial treatment under the antitrust laws, nevertheless acknowledges: "The size of the 1982-85 contracts understates the stakes of the case; the present value of a stream of payments of $74.288 million, extended for 32 years (the length of time the NCAA has had a TV Plan) and discounted at 2% . . . is $1,743,000,000." [citations omitted] (Pet. 8, n.)

NCAA controls all forms of televising of football games during the college football season (D.C. 43a). NCAA acts as the exclusive bargaining agent for all its members for the sale of television rights to college football games (D.C. 49a). Under its present Television Plan, NCAA has sold exclusive broadcast rights to ABC, CBS

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would have been broadcast locally were it not for the cumbersome requirements and procedures entailed in applying for an 'exception telecast'" (D.C. 59a).

[3] *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982).

and Turner. NCAA sets the specific uniform amounts the networks will pay for national and regional telecasts.[4] NCAA also sets the minimum and maximum permitted telecasts, the maximum number of appearances per school and prohibits the sale of football telecast rights outside the NCAA Plan with very limited exceptions (D.C. 58a-64a).

The set fee agreement has grossly distorted the prices for college football broadcasts which would obtain in a free market, as even NCAA's expert admitted (D.C. 66a): "[W]ere it not for NCAA controls, many more college football games would be televised" (D.C. 66a). "Because of NCAA controls, local stations are often unable to televise games which they would like to, even when the games are not being televised at the network level" (D.C. 66a), limiting "production to a level far below that which would occur in a free market situation" (D.C. 67a).

The evidence at trial failed to show any economic or any other justification for the NCAA's economic restraints. The evidence failed to show any connection between the Television Plan and live game attendance (D.C. 68a-70a). Nor did the evidence show any connection between competitive balance and the NCAA Plan (D.C. 70a). Indeed, far from creating any "competitive balance" the evidence at trial showed, and the trial court found, that the NCAA plan has created and perpetuated a "power elite" in college football (D.C. 98a). Football is the only sport in which the NCAA restrains the business of telecasting intercollegiate games (D.C. 48a). College basketball also attracts national television coverage, but is not subject to the restrictions of the NCAA Plan (D.C. 47a).

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[4] NCAA's Executive Director has admonished subordinates to use the word "recommend" rather than "set" in reference to price. The trial court found, on all the evidence, that this was "an attempt to conceal NCAA's power to fix the price of college football games" (D.C. 78a). The Court of Appeals affirmed (C.A. 15a).

It is virtually impossible for a college to operate a fully-rounded intercollegiate athletic program without NCAA membership (D.C. 53a-54a). A college cannot operate outside the Television Plan and freely sell football broadcast rights to, for example, a television station member of INTV, because it would be expelled from NCAA as a result and NCAA rules would prohibit any member college from playing televised football games with non-NCAA members (D.C. 68a).

College football is a uniquely desirable product to broadcasters in the time slot when it is available, Saturday afternoons during football season (D.C. 71a-73a). The NCAA Television Plan prevents willing sellers (such as Oklahoma and Georgia) from selling their product to willing buyers (such as television station members of INTV) in conformance with the free market principles of the antitrust laws (D.C. 66a-67a).

REASONS FOR DENYING THE WRIT

NCAA's petition really asks this Court to do two things: (1) to review and overturn findings of fact made by the trial court and affirmed by the Tenth Circuit upon its review of the entire record and (2) to accept novel and radical views of antitrust law espoused by a minority enclave of theorists which would overturn nearly a century of jurisprudence under the Sherman Act. A writ of certiorari should not issue to do either.

I.

CERTIORARI SHOULD NOT ISSUE TO REVIEW THE EVIDENCE AT TRIAL AND THE FINDINGS OF THE TRIAL COURT

Two fundamental principles guide this Court in addressing challenges to findings of fact at trial; the NCAA ignores each of them.

First, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of

witnesses." F.R. Civ.P., Rule 52(a). This Court has twice recently reaffirmed its adherence to the literal and strict requirements of Rule 52:

> Our recent decision in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), emphasizes the deference Fed. Rule Civ. Proc. 52 requires reviewing courts to give a trial court's findings of fact. "Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings. . . ." At ——, 102 S.Ct., at 1789.

Rogers v. Herman Lodge, —— U.S. ——, 102 S.Ct. 3272, 3278 (1982). In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 108 (1969), the Court held:

> The question for the appellate court under Rule 52 (a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.

Those challenging findings of fact under the "clearly erroneous" standard face "an almost insurmountable burden." *International Boxing Club v. United States*, 358 U.S. 242, 252 (1959).

Second, "exceptional circumstances" must be present before this Court will review a district court's factual findings. "A court of law, such as this Court is, rather than a Court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944); *Williams Mfg. Co. v. United Shoe Machinery Corp.*, 316 U.S. 364, 367 (1942); *Baker v. Schofield*, 243 U.S. 114, 118 (1917). Additionally, this Court does "not grant a certiorari to review evidence and dis-

cuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Even where a petition argues that findings of fact were clearly erroneous (and NCAA never makes this argument), review will not be granted absent the most exceptional circumstances:

> In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous.

Branti v. Finkel, 445 U.S. 507, 512, n.6 (1980).

NCAA not only ignores these principles, it also ignores the facts found against them. For example, central to the Petition's thesis is the assertion:

> There are procompetitive benefits. We cannot describe all of them here, but one so stands out that it alone precludes *per se* analysis.[9] The Plan and contracts spread national and regional TV appearances among more teams than would be the case in their absence. This puts the teams on more equal footing in recruiting new players and financing their programs. That is to say, it promotes "balance."
>
> * * * *
>
> [9] A second procompetitive effect is that the Plan and contracts increase live attendance at games by reducing the conflict between telecasting and live games. The increase in live attendance preserves the aura and excitement created by crowds, which in turn makes football more attractive (as a live rather than "studio" event) for television viewers, networks, and advertisers.

(Pet. 14 and n.)

At trial, NCAA failed to prove these assertions (D.C. 68a-70a). The district court found as a fact that, far from promoting balance, the NCAA plan has perpetuated a "power elite" in college football (D.C. 98a).

In addition to ignoring the trial court's fact findings, NCAA seeks to avoid them with a piece of linguistic legerdemain. NCAA poses as one of its questions for review:

> Whether in order to avoid application of the *per se* rule the defendant in an antitrust case must prove not only the existence and extent of procompetitive benefits but also the "necessity" of the contractual arrangements.

It asserts:

> The court conducted the survey with its thumb on the scale, though: it held that the *per se* rule applies unless the defendant establishes not only that its conduct is procompetitive in fact but also that the restraints it has chosen are "necessary" to the achievement of these procompetitive results (App. A, *infra*, 11a & n.9, 15a; see also 13a & n.14).

The District Court held that a non *per se* restraint would be lawful if, among other things "it is *reasonably* necessary to complete the legitimate purpose of the arrangement and of the broader scope than *reasonably* necessary." (D.C. 95a). From the context of the district court and appellate opinions, both courts required no more than some logical causal connection between the challenged restraint of trade and the claimed benefit. NCAA failed to prove *any* connection between the restraints of the Television Plan and the alleged benefits (D.C. 60a-70a).

II.

A GRANT OF CERTIORARI WOULD INVITE CONDUCT LONG HELD TO BE ILLEGAL

Very little conduct is *per se* unlawful under the antitrust laws: price fixing, horizontal agreements to restrict output or divide markets, group boycotts, tying arrangements. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958). These few rules stand as clear signposts to prohibited commercial conduct. "The costs of judging business practices under the rule of reason . . . have been reduced by the recognition of *per se* rules."

Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343 (1982). See, F. Scherer, *Industrial Market Structure and Economic Performance*, 438-443 (1970). If NCAA's petition is granted—whatever the outcome on final review—competitors will be encouraged to fix prices, restrict output and divide territories in the hope that they will be permited the chance to justify them economically. Antitrust law does not need such additional uncertainty. Our over-crowded courts do not need the certain increase in litigation that would follow.[5]

The district court found that NCAA controlled the price to be paid to teams participating in the Television Plan and made it impossible for the teams to negotiate any higher price for broadcast rights to their football games (D.C. 64a-65a). NCAA's expert conceded that the fee arrangement grossly distorted free-market forces. The Tenth Circuit affirmed the district court's ruling that the Television Plan constitutes *per se* illegal price fixing (C.A. 15a). The district court also found NCAA to have violated the antitrust laws *per se* in the horizontal agreement to restrict output. Both the district court and court of appeals found an unreasonable restraint in the bi-level horizontal agreements eliminating in most cases NCAA members' abilities to sell football broadcast rights outside of the Television Plan to, for example, a member station of INTV, or any other individual television station, network-affiliate or independent.

NCAA's petition is a transparent attempt to do away with *per se* rules against price fixing and horizontal agreements to limit output. The argument is but another expression of a radical polemic which disagrees

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[5] The overcrowding of the federal courts in general, and of the Supreme Court in particular, has reached what the Chief Justice has termed "a disaster area," and prompting suggestions for reform from most of the nine Justices. (Newsweek, February 21, 1983, Pgs. 81-83; Congressional Quarterly Weekly Rpt., September 18, 1982, Pg. 2314)

with much of American antitrust jurisprudence. NCAA's attorney, Professor Easterbrook, a member of the so-called "Chicago School," has, for example, recently written in favor of "Maximum Price Fixing," 48 U. Chi. L.Rev. 886 (1981) ("Easterbrook"). He found the fee agreement among competing physicians in *Arizona v. Maricopa County Medical Society*, 643 F.2d 553 (9th Cir. 1980), *rev'd* 457 U.S. 332 (1982), to be a "textbook example" of "beneficial" price fixing. *Easterbrook* 894-95. This Court did not agree:

> Our decisions foreclose the argument that the agreements at issue escape *per se* condemnation because they are horizontal and fix maximum prices. *Kiefer-Stewart* and *Albrecht* place horizontal agreements to fix maximum prices on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices. The *per se* rule "is grounded on faith in price competition as a market force and not on a policy of low selling prices at the price of eliminating competition." Rahl, Price Competition and the Price Rule—Preface and Perspective, 57 Nw.U.L.Rev. 137, 142 (1962).

457 U.S. at 348.

Maricopa condemned the physician's price fixing as being *per se* unlawful for the same reason the district court condemned a price fix setting at the same price the Oklahoma-Southern Cal football game and Citadel-Appalachian State, "a gross distortion of free market forces" according to NCAA's own witness (D.C. 66a).

NCAA would also justify its price fixing and other restraints on the theory that the competing colleges and universities are engaged in a joint venture. The Ninth Circuit was once misled into accepting a like argument in *Radovich v. National Football League*, 231 F.2d 620, 622 (9th Cir. 1956), but this Court reversed, 352 U.S. 445 (1957). The term "joint venture" is nothing but a generality for a certain kind of concerted activity, and

concerted activity is the central focus of the antitrust laws. The Court held in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951):

> "Nor do we find any support in reason or authority for the proposition that agreements between *legally* separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture'. Perhaps every agreement and combination to restrain trade could be so labeled."

NCAA argues that "football entails both competition and cooperation. Every game has two teams, and the competition must be balanced or the games will not be attractive . . . Balance is procompetitive because it enhances output" (Pet. 15). This hypothetical argument ignores that the trial proved no relationship between any so-called competitive balance and the challenged restraints (D.C. 68a-70a). The question the district court and court of appeals addressed—and NCAA ignores—is not whether *some* rules of football or amateurism may be lawful but whether price fixing, restriction of output and excluding would-be buyers of a unique product can be reconciled to the antitrust laws.

The combination of restraints in NCAA's Television Plan which effectively prevent member universities from selling television rights to their football games to members of INTV and other local television stations, makes NCAA's challenged practices entirely different from those in *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979). ASCAP "members may grant ASCAP only nonexclusive rights to license their works for public performance. Members, therefore, retain the rights to license public performances, along with the rights to license the use of their compositions for other purposes." 441 U.S. at 11.

NCAA also implies, though does not straightforwardly argue, that "because of the amateur and educational

nature of college football, the application of the ordinary approach to antitrust is unwarranted" (Pet. 7).[6] Any notion that learned, educational, amateur or any other profession or calling engaged in commerce is exempt from the full force and effect of the antitrust laws was rejected in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975). Activities in commerce of whatever nature are subject to the antitrust laws. No implied exemption is permitted. *Id.* at 787-88. Applying the *per se* rule against price fixing to the medical profession, this Court recently reaffirmed the rule of *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940):

> We are equally unpersuaded by the argument that we should not apply the per se rule in this case because the judiciary has little antitrust experience in the health care industry. The argument quite obviously is inconsistent with *Socony-Vacuum*. In unequivocal terms, we stated that, "whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." 310 U.S., at 222.

Arizona v. Maricopa County Medical Society, 457 U.S. at 349.

Higher education is big business. College football is big business. *Per se* rules are as applicable to college football as to any other area of commerce.

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[6] The district court found that NCAA chose not to seek an exemption from Congress for its Television Plan because it believed Congress would decline the request (D.C. 78a).

CONCLUSION

The petition for a writ of certiorari should be denied or, if granted, the Tenth Circuit should be summarily affirmed.

Respectfully submitted,

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